No. 3815

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY
(a corporation),
Plaintiff in Error,

vs.

JOHN LARSON,
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the Alaska Juneau Gold Mining Company, the plaintiff in error herein, and petitions the court for a rehearing, and in that connection represents:

That the court in its opinion did not pass upon or go into the exact question intended to be urged by the plaintiff in error in its brief in

this—it was contended by the plaintiff in error that in a case of this kind the market value of the property destroyed plus interest is the measure of damages, and there was no evidence introduced in this case to show what the market value was; and, further, that if the case should be regarded as one in which the property had no market value, then it would be incumbent upon the defendant in error to establish by proof the exact character of the property alleged to have been destroyed with reference to whether it was old or new, in good repair or otherwise, what it had cost, what it would cost to replace it and other elements that might enter into the case.

The authorities cited by the court in support of its views undoubtedly sustain the proposition that the plaintiff being the owner of the goods destroyed had the right to testify as to their value notwithstanding the fact that he might not be qualified to so testify in the case where the property belonged to some one else, and the case of Pecos & N. T. Ry. Company v. Grundy, 171 Southwestern 516, seems to sustain the proposition that the owner of the property may testify as to its value without giving any further description of the property or going into the question of what the property is like.

With reference to the first proposition it would seem rather harsh to prevent the owner of property from testifying as to its value in cases where he would not be technically qualified to do so and the courts have quite generally held, it seems, that

he would not be denied this right; but, while an owner of property might have the right to testify to its value *from his view point,* and that is all he could do, his testimony will in no sense have a tendency to establish *the market value* of the property unless he testified further that he knew something about the market value, for what property might be worth to an owner, viewed through the eyes of an owner, at least would be a very different thing from what it would sell for in the market. In cases where such evidence as the mere valuation of property placed thereon by an owner not otherwise qualified to testify, is received we contend that the testimony should be accompanied by other testimony showing the character of the property, its age, state of repair and such other elements as bear upon its value, so that the jury would have something to go by. In other words, the plaintiff in a case of this character must ordinarily establish the market value of property, but if the property has no market value, then its value is its use value and that depends upon many things that go into its condition and state of repair. Market value is established by the testimony of experts; use value is established primarily by showing the character and condition of the property itself in order that the jury may place a value thereon and in proper cases this testimony may truly be supplemented by the testimony of witnesses as to what they estimate the property to be worth, but these estimates standing alone are not evidence of value when offered

independent of evidence touching the character and condition of the property itself.

To hold that evidence when given by the owner of property with reference to its value, in cases where such owner knew nothing of the market value, would be sufficient to go to the jury without other evidence of the condition of the property itself or other supporting testimony, would be to hold that in a case where the owner testified concerning the value of the property from his view point without reference to its market value, the defendant would not be able to offer any evidence at all, for it is only market value that can be proven by experts and it is only such witnesses that a defendant has a right to call. The plaintiff can testify notwithstanding the fact that he knows nothing about the market value for the sole reason that he is the owner of the property; and the other party not being the owner of the property has no legal right to offer such evidence. In a case, therefore, where the plaintiff, being the owner of the property, testifies that the property has a given value from his view point and does not base his testimony upon what such property is worth in the market, the defendant cannot meet this evidence by similar evidence for the reason that he is not the owner of the property and cannot speak concerning its value unless he is an expert, that is to say, unless he knows the market value, nor can the defendant produce witnesses to show what the market value of the property would be because if

the plaintiff does not produce any evidence with reference to the character of the property itself, no witness can testify concerning the market value of the property not knowing its character unless, indeed, the defendant should have been so fortunate as to have on hand a witness who might have seen the property prior to the time of its destruction, and a case of this kind would of course be a rare occurrence. The ruling of the Supreme Court of Texas in the case reported in 171 Southwestern 318, is based upon a proposition which we think this court would hesitate to endorse and that is that the measure of damages in such cases is not what the market value of the property is nor indeed what its use value is but what it was worth to the plaintiff prior to the time of its destruction. Under this rule it would be immaterial what a thing could be sold for on the market or to what use it could be put. The sole question to be inquired into would be what was it worth to the plaintiff, and its value to the plaintiff in many cases would be based largely upon matters that could not form a basis upon which either the court or jury could estimate the value. Heirlooms, keepsakes and other like articles of property would have a fanciful value to the plaintiff under this rule. The Texas court holds that because this is the proper measure of damages, it is entirely immaterial what the condition of the property is or the elements that enter into the calculation. Of course this is true for obvious reasons, the property may be a keepsake which has

no value except to its owner. Under this rule he has a right to testify that to him it is worth a given sum of money. There would, under those conditions, be no reason why he should describe the property because its market value or use value would not enter into the question of how much he could recover, nor would the production of this class of testimony assist the defendant in rebutting the testimony offered by the plaintiff in regard to the value because the value of the property which the plaintiff might under this rule recover, does not in any sense depend upon the property itself, its condition or state of repair, or anything of that kind. It simply depends upon the plaintiff's state of mind. If to him the property is worth a fixed sum, that settles it. And of course no witness can testify upon the question of how much store another person sets by a piece of property. He might testify as to its market value or its use value but the value that it has because of any particular association is a thing that can be determined only by the one person who knows the facts, whose state of mind is the governing factor. If this court would hesitate to adopt any such rule with reference to the measure of damages, it would seem to follow that it would not adopt the decision based upon this proposition and would require the plaintiff in such case either to prove the market value or the use value. That is to say, would either require the plaintiff to prove by those familiar with market conditions what the particular articles could be

bought or sold for on the market, or would call upon the plaintiff to produce evidence showing the character of the property itself, its condition, state of repair, etc., in order that the jury might reach some conclusion in regard to its use value.

While it is true that in this case the plaintiff was not cross examined with a view to establishing the character of the various articles of property enumerated in the list, it seems to us that this is clearly a part of the plaintiff's case, and the duty does not devolve upon the defendant to establish by cross examination those things which the law requires the plaintiff to establish. It was the duty of the plaintiff to show what this property consisted of and what its character and condition was. If he did not choose to produce evidence upon these points, the defendant was not obliged to do so. Moreover it cannot be assumed that the defendant would have been able to bring out these matters upon cross examination. The witness might or might not have been familiar with the matters sought to be established, presumably not, or the plaintiff would have inquired about them. To hold that the duty rests upon the defendant to cross examine and bring out these facts to which the jury are entitled, would be to cast upon the defendant in every case the duty of asking every possible question upon which a witness might be able to speak, for if he did not do this it could be assumed that the witness would have testified thus and so if interrogated upon cross-axamination.

The Supreme Court of Texas also refers to the point that in that case the opposing party did not offer evidence upon the question of the value of the property destroyed. We do not know what the facts were in the Texas case, but in this case it would not have been possible under the present state of the record for the defendant to have offered any such testimony. It had before it a list of articles of property, including a range valued at a fixed sum and other articles enumerated in the same manner. Clearly it could not call witnesses and ask them whether a range was worth the sum stated or whether any other articles were worth the sum stated unless some one had first testified in regard to the character or condition of the property.

Because of the fact that this point was probably not made sufficiently clear in the opening brief and oral argument was not had we present this petition in order that the court may, if it is deemed just and proper, grant a rehearing upon this single point.

Dated, April 15, 1922.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error and Petitioner.

WM. E. COLBY,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, April 15, 1922.

WM. E. COLBY,
Of Counsel for Plaintiff in Error and Petitioner.